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Penalty Calculation for Morgan Electro Ceramics Case

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Penalty for Violations in Morgan Electro Ceramics Case

Based on the advice of Regional Counsel, although the FOVs / NOVs cite violations that extend back more than five (5) years, a penalty is only being assessed for those violations that took place within "five years before the date of the APO". I used the date of 10-1-04 as the anticipated date of the issuance of the APO. That means that any cited violation that occurred prior to October 1, 1999, was not counted in the penalty calculation for penalty purposes, although violations that took place before October 1, 1999, are listed below.

Economic Benefit Component

1. Benefit from delayed costs

The facility was not required to install new or replacement control devices. Although the company did, eventually, decide to replace the violating degreaser, I do not think that should be considered a cost that was required in order for the facility to achieve compliance. The company spent a certain amount of time and expense in an effort to repair the existing degreaser and eventually decided to replace it entirely.

The company has claimed that no additional costs were required for P019 when it was installed in 1999 because existing employees operated and maintained the degreaser as part of their regular duties. Similarly, the company makes the same argument with respect to the costs associated with the replacement of degreaser L001 which has been replaced with a new degreaser identified as L002.

2. Benefit from avoided costs

The company has stated, in a February 26, 2004, letter from their legal counsel, that they did not incur any one time depreciable expenditures to set up a better recordkeeping system to monitor solvent use and to train employees for solvent use because those activities were performed by current employees of the company.

The company did spend approximately $154.30 for a flowmeter for a perchloroethylene hand pump. That expenditure will help them monitor miscellaneous use of perchloroethylene more

accurately. The monitor will also reduce the amount of perchloroethylene that had been included in the amount reported as being emitted from the degreasers. The company had been improperly including miscellaneous use of perchloroethylene in its calculations which had the effect of making it appear that more perchloroethylene was being emitted.

3. Adjusting the Economic Benefit Component

a. Economic benefit component involved insignificant amount

Because the economic benefit in this situation is less than $5,000.00 no economic benefit penalty will be sought.

B. Gravity Component[1]

1. Actual or possible harm

a. Level of violation

Percent Above Standard

According to the penalty policy "Ordinarily the highest documented level of violation should be used. " However, if that level is not representative of the period of violation, then a more representative level of violation may be used.

Here are the percentages above the standards for each violation

Three month period	Degreaser (OEPA ID #)	Allowed average monthly limit (lbs/month/sq. ft. of surface area)	Reported average monthly emissions (lbs/month/sq. ft. of surface area)	Percent above standard
4-1-99[2] through 6-30-99	P019	30.6	36.9	120.59% of the limit or 20.57% above the standard

[1]Although the violations in this case involve more than one degreaser, according to the January 17, 1992, memo titled "Clarifications to the October 25, 1991, Clean Air Act Stationary Source Civil Penalty Policy," "...in instances where a particular regulation is violated at several emissions units, the gravity component is calculated only once for the entire facility".

[2] Because this violation took place more than 5 years before the anticipated date of the APO, it is not included in the penalty calculation.

10-1-99 through 12-31-99	L001	30.6	51	166.67% of the limit or 66.67% above the standard
11-1-99 through 1-31-00	L001	30.6	63.5	207.51% of the limit or 107.52% above the standard
6-1-00 through 8-31-00	L001	30.6	32.2	105.5% of the limit or 5.23% above the standard
2-1-03 through 4-30-03	P019	30.6	93.6	305.88% of the limit or 205.88 % above the standard
3-1-03 through 5-31-03	L001	30.6	46.9	153.27% of the limit or 53.27% above the standard
3-1-03 through 5-31-03	P019	30.6	155.8	509.15% of the limit or 409.15% above the standard
4-1-03 through 6-30-03	L001	30.6	75.9	248.04% of the limit or 148.04% above the standard
4-1-03 through 6-30-03	P019	30.6	160.9	528.82% of the limit or 425.82% above the standard
Average		30.6	79.63	260.23% of the limit or 160.23% above the standard

Because the range of percentages above the standard is so wide, the highest level above the standard should not be viewed as being representative of the period of violation. Instead, the average percentage above the standard for the entire reporting period is being used as a more representative value.

The average violation in this case is 175.76 % above the standard. When a violation is between 151and 180% above the standard, **the penalty is $30,000.**

b. Toxicity of the pollutant

Because this is a violation of a NESHAPs emission standard that is not handled by a separate appendix to the penalty policy, **the penalty is $15,000.**

c. Sensitivity of the environment.

Some of the violations in this case are SIP violations but they are not violations of SIP emission limits and they are not work practice or technology standards that are serving as emission standards. According to a memo dated January 17, 1992, titled "Clarifications to the October 25, 1991 Clean Air Act stationary Source Civil Penalty Policy", U.S.EPA took the position that the toxicity of the pollutant and sensitivity of the environment figures of the gravity component apply only to violations of emissions standards and to work practice or technology standards that are serving as emissions standards. Because of that policy decision, no gravity component is included for sensitivity of the environment.

In addition, the pollutant in this case is tetrachloroethylene which is defined by U.S.EPA to have negligible photoreactivity. (See 40 C.F.R. § 51.100(s)(1)) Because this gravity factor is related to the attainment status of the area where the violation occurred it would not be appropriate to add to the penalty when the pollutant has been identified as one that does not contribute to nonattainment problems for ozone. **No penalty is assessed for sensitivity of the environment.**

d. Length of time in violation

According to the penalty policy, this portion of the penalty should be addressed separately for each violation, including procedural violations such as monitoring and record keeping. However, because the January 17, 1992 policy memo mentioned previously, does not allow for a separate gravity component for each individual emissions unit when each unit has a violation of the same emissions standard, the length of time for concurrent violations at separate degreasers has been treated as if only one emissions unit was involved.

Violations and length of time

Violations cited in the November 2003 FOV/NOV

Violation of 40 C.F.R. §§ 63.464(a)(1)(ii), 63.4(a)(1), 63.464(b)[3]:

[3]Although three regulatory requirements are listed, they all are similar in nature and the same action caused each violation to occur concurrently. Therefore, for the purposes of calculating the duration of the violation, only one time period is calculated that covers all three violations.

4-1-99 through 6-30-99[4]	3 months (not included - see footnote 4 below)
10-1-99 through 1-31-00	4 months
6-1-00 through 8-31-00	3 months
2-1-03 through 6-30-03	6 months
Total	13 months

According to the penalty policy, a violation that lasts from between 13 and 18 months **is assessed a penalty of $20,000.**

Violation of 40 C.F.R. § §63.4(a)(2) and 63.464(a)(1)(i)[5]

January 2003 through March 2003 - 3 months[6]

According to the penalty policy, a violation with a duration of between 2 and 3 months is **assessed a penalty of $8,000.**

Violation of SIP approved OAC 3745-35-02 (A)

2-16-96 until 1-04	96 months - however, for purposes of calculating a penalty, only the time period between 10-1-99 and January 2004 is included. That period of time is 52 months

According to the penalty policy, a violation with a duration of between 49 and 54 months is **assessed a penalty of $50,000**.

Violations cited in the July 2004 FOV

Violation of 40 C.F.R. §§ 70.5(a)[7], 70.1(b) and 70.7(b) for the three degreasers present in 1995:

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[4] Because this violation took place more than 5 years prior to the anticipated date of the APO it is not included in the penalty calculation.

[5] Although two regulatory requirements are listed, they are essentially identical and for the purposes of calculating the duration of violation, only one time period is calculated.

[6] Based on Morgan's statements in a April 23, 2003, letter to George Czerniak in which they stated that an exceedance of a 3 month rolling average limit was due to an overestimation of volume added when filling the unit.

[7] Although the general penalty policy does not directly address the failure to submit a timely application for a Title 5 operating permit, Appendix I of the Penalty Policy, also known as the "permit penalty policy" does address violations of the permitting requirements for new

October 1996[8] through January 2004 -88 months (only 52 months of which are included in the penalty calculation)

According to the penalty policy, violations of 49 to 54 months in duration are assessed a penalty of $50,000. The penalty policy does not address the issue of penalties that last more than 60 months so **the penalty assessed for this violation is $50,000.**

Violation of 40 C.F.R. § 70.5(a) for the Baron Blakeslee MLR 280 degreaser installed in 1997

December 1998 through January 2004 - 62 months (only 52 months of which are included in the penalty calculation)

According to the penalty policy, violations of 49 to 54 months in duration are assessed a penalty of $50,000. The penalty policy does not address the issue of penalties that last more than 60 months so **the penalty assessed for this violation is $50,000.**

Violation of 40 C.F.R. § 70.5(a) for the Finishing Equipment 6342 degreaser installed in 1999:

July 2000 through January 2004 - 43 months

According to the penalty policy, violations of 43 to 48 months in duration are assessed a penalty of $45,000. **The penalty assessed for this violation is $45,000.**

2. Importance to regulatory scheme

We have cited the company in November 2003 for failing to maintain an accurate log of solvent additions in violation of the requirements at 40 C.F.R. §§ 63.4(a)(2) and 63.464(a)(1)(i).

According to the penalty policy, when a company has incomplete records, which is the case for Morgan, a penalty of between $5,000 and $15,000 is appropriate. Morgan's failure was not complete and it did maintain some records so I feel a penalty at the lower end of the range is more appropriate. **The penalty assessed for this violation is $5,000.**

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sources. Since Appendix I adopts month - by - month accrual of penalties for purposes of convenience and for consistency with the general policy, I followed the same procedure for violations of the requirement to apply for a Title 5 permit and for operating without such a permit.

[8]Although more than one regulation was violated, the approach taken was to follow the example set in Appendix I of the penalty policy and view the permit violations as sequential or identical in relation to their duration.

According to the penalty policy, the failure to obtain an operating permit merits a penalty of $15,000. Although this same violation occurred three times (in relation to Title 5) and once in relation to the requirement to have a regular SIP based operating permit for at the Morgan facility, the January 17, 1992, memo titled "Clarifications to the October 25, 1991, Clean Air Act Stationary Source Civil Penalty Policy" states that "SSCD and AED have decided to maintain the position that in instances where a particular regulation applies to each individual emissions unit and the standard is violated at several emissions units, the gravity component is calculated only once for the entire facility." In this case, the Title 5 requirements apply to each individual emissions unit cited and the standard was violated at several emissions units, so the gravity component was calculated only one time. Although the November 2003 NOV included a violation of the SIP approved requirement to have an operating permit, no separate penalty is sought for that violation which occurred at one of the same emissions units. **The penalty assessed for these violations is $15,000.**

3. Size of Violator - The company, in its 2-26-04 response indicated the company Morgan Advanced Ceramics Inc. has a negative net worth of - $13,346,000. The value of its net current assets is $32,515,000. The penalty policy does not address situations where the net worth is negative. The penalty policy does state that when the net current assets is between 20,000,001 and 40,000,000 the appropriate penalty is $35,000. **The penalty assessed for the size of violator factor is $35,000.**

Summary of Gravity Component Before Adjustments

Actual or possible harm
- Level of violation **$30,000**
-Toxicity of pollutant **$15,000**
- Sensitivity of the environment - not applicable

Length of time in violation

for violations cited in the November 2003 FOV/NOV:
40 C.F.R §§ 63.464(a)(1)(ii), 63.4(a)(1), 63.464(b) - **$20,000**
40 C.F.R. §§ 63.4(a)(2), 63.464(a)(i) - **$8,000**
OAC 3745 - 35 -02 (A) - **$50,000**

for violations cited in the July 2004 FOV
40 C.F.R. §§ 70.5(a), 70.7(b), 70.7(b) (for three degreasers) - **$50,000**
40 C.F.R. § 70.5(a) (for degreaser installed in 1997) - **$50,000**
40 C.F.R. § 70.5(a) (for the degreaser installed in 1999) - **$45,000**

Importance to the regulatory scheme

for violations cited in the November 2003 FOV/NOV:

40 C.F.R. §§ 63.4(a)(2), 63.464(a)(i) - **$5,000**

for violations cited in the November 2003 and July 2004 NOVs/FOVs concerning the failure to obtain operating permits - **$15,000**

Size of violator

$35,000

Total gravity component before adjustments: **$323,000**

Adjustments to the gravity component

a. Degree of Willfulness or Negligence

There is no basis to increase the penalty for willfulness of negligence. There is evidence that the facility contacted the local agency and was given information that was not correct which contributed to some of the violations. In hindsight, it appears that some of the permanent solutions to the emissions problems should have been identified and implemented earlier. However, the facility tried to repair equipment first before determining that a new degreaser was the solution. That approach was not unreasonable.

Although it could be argued that the company was negligent in allowing poor recordkeeping practices the practices would actually hurt the company by making it appear more perchloroethylene was emitted than was allowed.

b. Degree of Cooperation

The company has been cooperative during our investigation. Although the company did report its violations of the MACT standard, it was required to do so by the regulations. The company corrected its violations but one cannot say the corrections was especially prompt. I recommend we adjust the gravity component downward by 15% based on the cooperativeness of the company.

c.. History of Noncompliance

Although the company did exceed its emission limit in the past, no enforcement action was taken which one could have argued should have had deterrent value.

d. Environmental Damage

No increase in the gravity component is warranted for this factor.

Gravity component after 15% adjustment down based on cooperativeness — **$274,550**

Litigation Risk

Several factors justify reducing the penalty due to litigation risks. Those factors are listed below.

a. The company will argue it relied on advice provided by the local agency and that advice proved to be incorrect. There is no dispute that the local agency staff did not fully evaluate the situation before it informed the company that it did not need permits for some of the equipment it installed.

b. The company chose to comply with an alternative standard that is allowed under the applicable MACT for this facility. However, had the company not chosen the alternative standard, it is likely some of the violations would not exist. Because the company chose to comply with the alternative standard, it is not able to take advantage of the general provisions of the MACT that allow certain malfunctions to be excused. The background document for this MACT does not explain why sources who choose to comply with the alternative limit do not get to take advantage of the provision that excuses certain malfunctions. EPA contacts for this regulation assume that the long averaging time of the alternate standard would eliminate the need for exemptions for malfunctions. However, the rulemaking record did not contain language that supports such a theory.

c. Because the company chose to comply with the MACT standard by complying with the alternative standard, its potential emissions are calculated in a way that does not take into account the actual design of the facility. The company is forced to use a standard emission factor when calculating potential to emit. As a result, calculated potential emissions may be significantly above what the potential emissions would be were design factors taken into account. Newer MACT standards do not contain similar provisions and would take into account the design of the facility when calculating potential to emit.

d. The alternate standard results in violations that extend over several months due to the fact that emissions are averaged over a three month period of time. The result is that you can have months where the degreaser is not operating but it is technically in violation because the emissions for the prior months (or future months) are so high that when averaged over a three month period of time, the monthly average exceeds the limit. This situation causes higher penalties and a court or ALJ may find that such a result is not just.

All of the risks cited above create some risk that a legal precedent could be set that might impact future cases or the enforceability of the regulation. Although the determination of litigation risk is more properly evaluated by an attorney, my recommendation would be to further reduce the gravity portion of the penalty by 40% to account for litigation risk.

Gravity component after 40% adjustment down based on litigation risk - **$164,730**

Ability to Pay

Although the company has not claimed it cannot pay its penalty, it reported that its parent company has a net worth of negative $13, 346,000. Although the value of the company's assets are reported to be over $32 million dollars, it is hard to ignore the negative net worth. The gravity portion of the penalty calculation ignored the negative worth and focused on the more than $32 million is assets. An ALJ may not find such an approach acceptable.

Offsetting Penalties Paid to State and Local Governments or Citizen Groups for the Same Violations

No penalties were paid.